United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-6173

To be argued by
ABRAHAM KAPLAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6173

ATLANTIC DEPARTMENT STORES, INC.,
Plaintiff-Appellee,

—*v.*—

UNITED STATES OF AMERICA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE WITH SUPPLEMENTAL APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ATLANTIC DEPARTMENT STORES, INC.,

Plaintiff-Appellee,

- against - 76-6173

UNITED STATES OF AMERICA,

Defendant-Appellant

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BRIEF FOR PLAINTIFF-APPELLEE

PRELIMINARY STATEMENT

In this action which was instituted for recovery of overpayment of 1974 employer's taxes under Federal Insurance Contributions Act (FICA), 26 U.S.C.§3111), the Government appeals from a judgment made and entered August 31, 1976, (Hon. Marvin E. Frankel, District Judge), granting plaintiff's motion for summary judgment, denying the defendant's motion for judgment on the pleadings or for dismissal for insufficiency, and adjudging that the plaintiff recover from the defendant the sum of $11,636.10, with interest thereon at 6% per annum. (A-37, A-38).

ISSUE PRESENTED

In the District Court, the issue presented was whether an employer who has overpaid employer's taxes under

FICA (26 U.S.C.§3111), must, as a condition for obtaining a refund for himself, also apply for refund of employees' taxes (26 U.S.C.§3101) on behalf of his employee.

The District Court held:

(a) that there is no such duty in the circumstances of this case. (A-30);

(b) that the regulations regarding refund of overpayment of taxes collected under FICA contain no requirements that an employer bring a claim on behalf of his employees in order to secure a refund of his own overpayment. (A-32, A-33).

(c). that the regulations, while suggesting that an employer may claim refund for overpayments of employees' taxes impose no such requirement on the employer and clearly contemplate claims brought individually by employers or employees. (A-33),

(d) insofar as the provision that a refund may be had only when the "overpayment cannot be adjusted" [26 U.S.C. §6413 (1) and §6413 (b)]; that (i) as 89% of the original 2,409 employees of the plaintiff from whom excess FICA taxes were withheld were no longer in plaintiff's employ, rendering reimbursement of the overpayment to them impossible, and (ii) that the cost of locating and communicating with the employees entitled to reimbursement would average half or more of the amount involved with respect to each employee, that these circumstances make this a case where the "overpayment cannot be adjusted". (A-35)

By its brief on the appeal, the Government has not challenged the determinations of the District Court stated in (a),(b) and (c) above, and has narrowed the issue to be decided by this Court to whether an employer who has overpaid employer's taxes under FICA (26 U.S.C.§3111), must, before obtaining a refund thereof repay or reimburse the overpayments of employees' taxes (26 U.S.C.§3101), to those employees still in its employ at the time that the overpayments are ascertained.

STATUTES & REGULATIONS INVOLVED

For a proper understanding of the statutory scheme, it is believed necessary to consider all of the statutes and regulations involved and not only those which appear in the Government's brief. (pp 5,8). The applicable sections of the Internal Revenue Code are 26 U.S.C. §3101 (Tax on Employees), §3111 (Tax on employers), §3121 (Definitions) and §6413 (Special rules applicable to certain employment taxes).

The treasury regulations involved are Reg.§31.6402 (a)-1 (Credits or refunds), Reg. §31.6402 (a)-2 (Credit or refund of tax under FICA or Railroad Retirement Tax Act), Reg. §301.6402-2 (Claims for credit or refund), Reg. §31.6413 (a)-1 (Repayment by employer of taxes erroneously collected from employee); Reg.§31.6413 (a)-2 (Adjustment of overpayments), Reg.§31.6413 (b)=1 (Overpayments of certain taxes) and Reg.§31-6051=1 (c) (Correction of statements and (d) (Time for furnishing statements].

For the convenience of the Court photocopies of these provisions as reproduced in CCH "Unemployment Insurance Reporter" (including editorial comment) are annexed in a supplemental appendix attached hereto. (hereafter SA)

FACTS AND PROCEEDINGS

The facts are not in issue. Plaintiff, a New York corporation, duly and timely filed its returns under the FICA during and for the calendar year 1974, and duly and timely paid the tax due thereof. (A-20). Subsequently it discovered that it had erroneously failed to exclude from "wages" upon which both the employees' tax (26 U.S.C§3101) and employer's tax (26 U.S.C.§3111) are based, amounts paid to employees absent from work on account of illness and under a qualified sick-pay plan, which are not includable as "wages" under FICA. [26 U.S.C.§3121 (a)(2)]. (A-21)

In June, 1975, it filed claim for refund of the overpayment of employer's tax for the calendar year 1974 in the amount of $11,636.10, which was rejected by the Internal Revenue System by notice received on or about July 10, 1975. (A-21). The basis of the rejection was that plaintiff had omitted from its claim for refund certain statements required by U.S.C.§3101 (Employees' tax under FICA) and Rev.Reg. §31.6402 (a)-2 (Credit or refund of tax under FICA or Railroad Retirement Tax Act). This suit was thereupon instituted.

In its answer the Government admitted that the reasons given for such disallowance were improper, but that the denial of the application was nevertheless proper in fact. (A-26).

After joinder of issue, defendant moved for judgment on the pleadings or in the alternative for judgment dismissing the complaint pursuant to Rule 12 (c) and 12 (b)(6) of the Federal Rules of Civil Procedure (A-10) and plaintiff cross-moved for summary judgment pursuant to Rule 56 of such rules. (A-13,14).

In connection with these applications, the parties, by stipulation (A-27,30) agreed among other things that:

> "3. The application for refund was made in accordance with the statutes and regulations pertaining thereto, and that the amount of the overpayment claimed therein, to wit, the sum of $11,636.10 is the amount of the overpayment of employer's tax under the FICA, for the calendar year 1974.
>
> 4. That the number of employees included in the overpayment for the year 1974 was 2,409 claimants, and that the average overpayment per claimant is the sum of $4.83.
>
> 5. That whereas plaintiff at one time did operate as many as 102 stores, at the time of the filing of the application for refund it was operating only 21 such stores, and that of the 2,409 claimants included in the application for refund of employer's tax only 11% thereof, or approximately 265 of such employees were still employed by it at the time of the filing of the said claim.
>
> 6. That to adjust the overcollection of the employees' tax (I.R.S.§3101) it would have been encumbent upon the employer:
>
> (a) to communicate with each of the employees covered by the claim, including over 2,000 who were no longer in its employ at the time of the filing of the claim, and some of whom may have left the plaintiff more than a year prior thereto;

(b) explain to each of these employees the overdeduction and the proceedings being taken by the employer,

(c) pay to each of these employees the amount of overdeduction, obtaining a written receipt therefor, or the employee's written consent to the allowance of the refund or credit to the employer, retaining such receipt or consent among its records,

(d) as the amount of the overpayment had been collected from the employee in a prior calendar year, obtain from each employee a written statement that (i) the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (ii) that the employee will not claim refund or credit of such amount. This statement, too, must be retained among the employer's records.

7. (a) It is estimated that as to any employees whose location is known and who is cooperative with the employer, the cost of compliance by the employer with these requirements exceeds $2.25 a claimant, as follows:

Original investigation to determine overdeduction and quarter in which overdeduction was made:	$1.00
Printing, stationery, mailing expense:	.80
Clerical and secretarial services:	.15
Follow up mailings:	.30
Total:	$2.25

This does not include the expense of accounting and legal services which may be incurred.

(b) As to employees who are not readily located or who prove uncooperative, the additional expenses involved in locating them and obtaining their cooperation, added to the basic cost above, the total expense may exceed the amount of the claim."

The Court thereafter rendered its decision, granting plaintiff's motion for summary judgment and denying the defendant's motion for judgment on the pleadings or dismissal. (A 30A36) The principal conclusions thereof are summarized under "Issue Presented" of this Brief. The judgment entered thereon (A-37, A38) is the subject of this appeal.

POINT

IT IS NOT A PRE-CONDITION OF A REFUND OF OVERPAYMENT OF EMPLOYER'S FICA TAX THAT THE EMPLOYER REPAY OR ADJUST THE OVERPAYMENT OF EMPLOYEES' FICA TAX

The answer to the issue presented upon this appeal is to be found in the applicable statutes and regulations governing the entire tax scheme, and not isolated portions thereof. Employment taxes are imposed by Subchapter C of the Internal Revenue Code. (26 U.S.C.§3101, et seq) Chapter 21 of Subtitle C is the "Federal Insurance Contributions Act" and is divided inot three subchapters.

Subchapter A is entitled "Tax on Employees" and by §3101 thereof (SA 17-A) imposes a tax on the income of employees based on a stated percentage of wages as defined by §3121 (a). Under §3102 (SA 17B), the employer has the obligation to deduct the amount of the tax from the wages of the employee as and when paid and the liability for the payment thereof to the Internal Revenue Service, with indemnification against claims and demands of any person for the amount of any such payment.

Subchapter B is entitled "Tax on Employers". By §3111 (SA 18) there is imposed an excise tax on every employer with respect to the individuals in his employ, equal to a fixed percentage of wages, as defined in §3121 (a). (SA 19A)

Subchapter C is entitled "General Provision" and by §3121 (a) (SA19A) thereof defines "wages" as all remuneration for employment, excepting (1) that part of the remuneration in excess of the contribution and benefit base as determined

under §230 of the Social Security Act. (2) the amount of any payment made to an employee under a plan or system established by an employer, which makes provision for his employees generally on account of (B) sickness or accident disability.

§6413 (SA 20) is entitled "Special Rules Applicable to certain employment Taxes" and by Subdivision (a)(1) thereof, provides that if more than the correct amount of tax imposed by §3101, §3111, §3201,§3220, or §3402 is paid with respect to any payment of remuneration, adjustment with respect to both the tax and the amount to be deducted shall be made, without interest in such manner, and at such time as the Secretary may by regulations proscribe.

Subdivison (b) of this section refers to overpayment of certain employment taxes and provides that if more than the correct amount of tax imposed by the foregoing sections is paid or deducted with respect to any payment of remuneration and the overpayment cannot be adjusted under subdivision (a), the amount of the overpayment shall be refunded in such manner and at such times, subject to the statute of limitations, as the Secretary or his delegate may by regulation prescribe. Pursuant to this authority the Treasury Department had adopted the following regulations.

Reg.§31.6402 (a)-1 (SA 21) states that the regulations under I.R.C.§6402. for special application to credits or refunds of employment taxes are to be found in §31.6402 (a)-2; §31.6402 (a)-3 and §31.6414-1, and for regulations under §6402

for general application to credits or refunds of employment tax are to be found under §301.6402-1 and §301.6402-2.

Reg.§31.6402 (a)-2(1) (SA 24) provides, so far as here material, that any person who pays to the District Director more than the correct amount of: (i) employee tax under §3101 or employer tax under §3111 of the FICA may file a claim for refund of the overpayment or may claim credit for such overpayment in the manner and subject to the conditions stated in §301.6402-2.(This latter regulation (SA 23) is administrative and provides the time for filing of claim for credit or refund; the form and information to appear thereon and makes the filing of such application a pre-condition of a civil suit for the refund.)

Subdivision (2) of Reg.§31.6402 (a)-2 (SA 24) provides by (i) that if an employer files a claim for employees' tax under §3101, collected from an employee, the employer must include a statement that the employer has (a) refunded the tax to said employee or (b) secured a written consent of such employee to allowance of the refund or credit retaining as part of his records the written receipt of the employee showing the date and the amount of the repayment or the written consent of the employee, whichever is used in support of the claim .

Subdivision (ii) thereof, provides that if the claim is for refund or credit of employee tax under §3101, collected in a calendar year prior to the year for which the credit or refund is claimed, the employer must also include a statement

that the employer has obtained from the employee a written statement (a) that the employee has not claimed refund or credit of the amount of the overcollection, or if so, said claim has been rejected and (b) that the employee will not claim refund or credit of such amount. This written statement must also be retained by the employer.

Reg.§31.6402(a)2(b) (SA25) provides that where more than the correct amount of employee tax under §3101 has been collected by an employer from an employee and paid to the District Director, the employee may file a claim for refund or overpayment, if (i) the employee does not receive the reimbursement from the employer and does not authorize the employer to file a claim and receive refund or credit; and the overcollection cannot be collected under Reg.§31.3503-1 (tax paid under wrong chapter) and the employee has not taken the overcollection into account in claiming a credit against or refund of his income tax, or if so, such claim has been rejected. With an employees claim for refund of overpayment of employees' tax, he must submit a statement setting forth (a) the extent to which an employer has reimbursed him in any manner for the overcollection, (b) the amount, if any

of the credit or refund which has been claimed by the employer or authorized by the employee to be claimed by the employer, and whether the employee has taken the amount of the overcollection into account in claiming a credit against or refund of income tax and the amount, if any, so claimed.

Reg.§31.6402 (c) (SA 26) is the only one which refers to an employers' claim for refund of employers' tax. It provides that whenever a claim for credit or refund of employee tax under §3101, employer tax under §3111, or either such tax is made, with respect to remuneration which was erroneously reported, the claim shall include a statement showing (1) the identification of the employer, (2) the name and account number of such employee,(3) the period covered by such return or schedule, (4) the amount of remuneration actually reported as wages for such employee and (5) the amount of wages which should have been reported for such employee.

Reg. §31.6413 (a)-1 (SA 28), provides that if an employer during any return period, collects from an employee more than the correct amount of taxes under §3101, and repays the amount of the overcollection to the employee before the return for such period is filed, and obtains and keeps as part of his records the written receipt of the employee, showing the date and amount of the repayment, the employer shall not report on any return or pay the District Director the amount of the

overcollection. On the other hand, if the overcollection is not repaid to and receipted by the employee, it must be reported and paid to the District Director, in the return for the period in which the overcollection was made, accompanied by a statement explaining the overcollection and setting forth the other information therein specified.

If the error is ascertained after the return for the period has been filed, but within the applicable period of limitation, the employer shall repay or reimburse the employee in the period following that within which the error is ascertained, unless the employer obtains written consent of employee to the allowance of refund or credit as provided by Reg.§31.6402 (a)-2 (i).

Reg.§31.6413 (a)-2, sub.(a) (SA 28) provides for adjustment of overpayments which the employer repays or reimburses an employee in the amount of an overcollection, as provided in Reg.§31.6413 (a)-1 §(b)1, the employer may claim credit for such amount in the manner and subject to the conditions stated in Reg.§31.6402 (a)(2), provided that the amount thereof is entered in a return for a period ending on or before the last day of the return period following that in which the error was ascertained.

With respect to employers' taxes, sub.(b) provides that if an employer pays more than the correct amount of employer tax under §3111, the employer may adjust the overpayment by claiming credit for the amount thereof in the manner and subject to the conditions stated in Reg.§31.6402 (a)-2,

but only if the amount thereof is entered on the same return on which the employer adjusts an overpayment of employee tax.

Reg.§31.6413 (b)-1 (SA 31), merely states that the provisions relating to adjustment of overpayments of taxes imposed § §§3101,3111, 3201,3221 or 3402 are to be found in Reg.§31.6413 (a)-2 and that the provisions relating to refunds of taxes imposed by these sections are to be found in Reg.§31.6402 (a)-1 and §31.6402 (a)-2.

Finally, Reg.§31.6051-1 (c), which neither party called to the attention of the District Court, provides that (i) if an adjustment of taxes under §3101 is made for an overcollection or undercollection of the employees' tax under §3101, or (ii) regardless of the reason for the error or the method of its correction, a corrected withholding statement is required to be furnished to the employee. The time for furnishing such corrected statement is fixed by Subdivision (d) as January 31st of the year succeeding the calendar year, or if the employment shall have been terminated before the end of the year, then the 30th day after the day on which the last payment of wages is made.

It is to be noted that employee FICA taxes (26 U.S.C.§3101) are separate and distinct from an employer's FICA tax (26 U.S.C.§3111) and are recognized and treated both in the statutes and the regulations as such. Wherever in any

provision, whether section or regulation, these taxes are mentioned together, it is always with the use of the disjunctive "or".

The lower Court was then fully justified and the Government does not question its conclusions that there is no requirement that an employer bring a claim for refund on behalf of his employees in order to secure a refund of his own overpayment. (A-31, A-33) and that an overpayment "cannot be adjusted" as to employees no longer in the employer's employ. (A-35)

With respect to the latter, it is argued peripherally that the date for determination of employees still in the employer's employ should be that when the overpayment is determined. (App's Brief p.15), rather than the date of the filing of the application for refund. This argument has no real substance under the facts here presented.

The employer became aware of the overpayment in the first quarter of 1975 after filing its report for 1974. (A-16,A-18), which was due on or before January 30 or February 10, 1975. [Reg.§31.6071 (a)(1)]. This awareness triggered the limitation of the period within which adjustment might be made, to wit: "the last day of the return period ending prior to the expiration of the return period following the return period in which the error is ascertained." [Reg.§31.6413 (a)-1 (b), Reg.§31.6413 (a)(2)(1)]

Some time must elapse between the awareness that sick-pay is not includable as "wages" and a determination of the names of the employees still employed to whom such sick-pay was paid and the amount of the overpayment of both the employees' and employer's FICA taxes by reason thereof. It is safe to assume that, even if the required information was developed by the employer before the end of the first period of 1975, that the number of employees in its employ at that time varied little from the number in its employ at the time it filed its applicaton for refund, the second period of 1975. (A-27). Except for an isolated few, he employees in its employ during the second quarter of 1975 were the same as those at the time of the filing of the application for refund during that quarter.

The only conclusion of the District Court to which the defendant excepts is that the cost of repaying or reimbursing the FICA overpayment as to employees who are still in the employer's employ would average half or more of the amount involved with respect to each employee and that this circumstance makes this a case where the "overpayment cannot be adjusted". (A-25)

The government argues first, that the cost of compliance is less than the amount which the parties stipulated, (A-29) and second, that if repayment or reimbursement is mandated, then the employer must comply therewith, without regard to the expense involved.

As to the first contention, the stipulation between the parties which was "So Ordered" by the Court, precludes the defendant therefrom. It is apparent now that with the requirement (not brought to the attention of the Court below) for the issuance by the employer of a corrected withholding statement, that the actual cost of compliance will exceed that stipulated.

As to the second contention, it has now long been the law that the cost of compliance with any requirement imposed either by the Federal, State or Municipal Government, must be taken into consideration in estimating the reasonableness of such requirements since an unreasonable imposition of expenses may be unconstitutional. (Missouri P.R.Co.v. Norwood, 283 U.S.249; Tenement House Dept. v. Moeschew, 179 N.Y.325, aff'd 203 U.S.583; Nashville C.& S. L.R.Co. v. Walters, 294 U.S.405)

The decision below is supportable on another basis. In arriving at its conclusion, the Court treated the provisions of I.R.C.§6413 as mandatory. Appellee believes that they are optional for the following reasons:

(a) The express purpose of the predecessor section to I.R.C.§6413 was to permit the employer to correct errors. (S.Rep.628,74th Cong.,1st Sess.at 43; H.Rep.615,7th Cong.1st Sess. at 30-31, and set forth in full in defendant's brief at PP 10 and 11).

(b) The penalty for failure to comply with the regulations permitting repayment or reimbursement is not the forfeiture of the concededly overpaid employer's tax, but rather that the employer may not himself adjust the employer's overpayment, but is relegated to the circuitous remedy of an application for refund and a suit, if it be rejected.

(c) Failure to comply would cause the forfeiture of a conceded overpayment within less than six months of the employer becoming aware thereof, notwithstanding that the period of limitation for refund of such overpayment is by statute fixed at three years from April 15th of the year succeeding that within which the overpayment was made.[26 U.S.C. §6511 and §6513 (c)].

CONCLUSION

Judgment appealed from should be affirmed.

Dated: Garden City, N.Y.
March 10, 1977

Respectfully submitted,

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SUBTITLE C—EMPLOYMENT TAXES

CHAPTER 21—FEDERAL INSURANCE CONTRIBUTIONS ACT

SUBCHAPTER A—TAX ON EMPLOYEES

[¶ 18,101] **RATE OF TAX**

Sec. 3101. (a) OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE.—In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

(1) with respect to wages received during the calendar year 1968, the rate shall be 3.8 percent;

(2) with respect to wages received during the calendar years 1969 and 1970, the rate shall be 4.2 percent;

(3) with respect to wages received during the calendar years 1971 and 1972, the rate shall be 4.6 percent;

(4) with respect to wages received during the calendar year 1973, the rate shall be 4.85 percent;

(5) with respect to wages received during the calendar years 1974 through 2010, the rate shall be 4.95 percent; and

(6) with respect to wages received after December 31, 2010, the rate shall be 5.95 percent.

(b) HOSPITAL INSURANCE.—In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

(1) with respect to wages received during the calendar years 1968, 1969, 1970, 1971, and 1972, the rate shall be 0.60 percent;

(2) with respect to wages received during the calendar year 1973, the rate shall be 1.0 percent;

(3) with respect to wages received during the calendar years 1974 through 1977, the rate shall be 0.90 percent;

(4) with respect to wages received during the calendar years 1978 through 1980, the rate shall be 1.10 percent;

(5) with respect to wages received during the calendar years 1981 through 1985, the rate shall be 1.35 percent; and

(6) with respect to wages received after December 31, 1985, the rate shall be 1.50 percent.

1973 Amendments:

Section 6(a)(1) of P. L. 93-233, applicable only with respect to remuneration paid after December 31, 1973, substituted present paragraphs (a)(4) through (6) for the following:

"(4) with respect to wages received during the calendar years 1973, 1974, 1975, 1976, and 1977, the rate shall be 4.85 percent;

"(5) with respect to wages received during the calendar years 1978 through 2010, the rate shall be 4.80 percent; and

"(6) with respect to wages received after December 31, 2010, the rate shall be 5.85 percent."

Section 6(b)(2) of P. L. 93-233, applicable only with respect to remuneration paid after December 31, 1973, substituted present paragraphs (b)(2) through (6) for the following:

"(2) with respect to wages received during the calendar years 1973, 1974, 1975, 1976, and 1977, the rate shall be 1.0 percent;

"(3) with respect to wages received during the calendar years 1978, 1979, and 1980, the rate shall be 1.25 percent;

"(4) with respect to wages received during the calendar years 1981, 1982, 1983, 1984, and 1985, the rate shall be 1.35 percent; and

"(5) with respect to wages received after December 31, 1985, the rate shall be 1.45 percent."

"(4) with respect to wages received after December 31, 1967, the rate shall be 4½ percent."

Sec. 111(c)(5) of the SS Amendments of 1965, which became operative (see Sec. 111(e) of these amendments at ¶ 18,914) as a result of the enactment of P. L. 89-212, approved September 29, 1965, deleted the following from the end of the parenthetical phrase preceding subparagraph (b)(1), as enacted by Sec. 321(b) of the SS Amendments of 1965: ", but without regard to the provisions of paragraph (9) thereof insofar as it relates to employees".

History:

Sec. 3101 of the Internal Revenue Code of 1954 (P. L. 591); as amended by sec. 208(b) of the SS Amendments of 1954 (P. L. 761), secs. 202(b) and (d) of the SS Amendments of 1956 (P. L. 880), sec. 401(b) of the SS Amendments of 1958 (P. L. 85-840), sec. 201(b) of the SS Amendments of 1961 (P. L. 87-64), secs. 111(c) and 321(b) of the SS Amendments of 1965 (P. L. 89-97), secs. 109(a) and (b) of the SS Amendments of 1967 (P. L. 90-248), sec. 204(a) of P. L. 92-5, secs. 204(a) and (b) of P. L. 92-336, secs. 135(a) and (b) of the SS Amendments of 1972 (P. L. 92-603), secs. 6(a) and (b) of P. L. 93-233.

DEDUCTION OF TAX FROM WAGES

[¶ 18,102] Requirement

Sec. 3102. (a) The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. An employer who in any calendar quarter pays to an employee cash remuneration to which paragraph (7)(B) or (C) or (10) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar quarter is less than $50; and an employer who in any calendar year pays to an employee cash remuneration to which paragraph (8)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than $150 and the employee has not performed agricultural labor for the employer on 20 days or more in the calendar year for cash remuneration computed on a time basis; and an employer who is furnished by an employee a written statement of tips (received in a calendar month) pursuant to section 6053(a) to which paragraph (12)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax with respect to such tips from any wages of the employee (exclusive of tips) under his control, even though at the time such statement is furnished the total amount of the tips included in statements furnished to the employer as having been received by the employee in such calendar month in the course of his employment by such employer is less than $20.

1965 Amendments:

All that part of the second sentence of section 3102(a) beginning with the second semicolon and preceding the period at the end of the sentence was added by section 313(c)(2) of the SS Amendments of 1965, effective with respect to tips received after 1965.

History:

Sec. 3102(a) of the Internal Revenue Code of 1954 (P. L. 591); as amended by sec. 205A of the SS Amendments of 1954 (P. L. 761), sec. 201(h) of the SS Amendments of 1956 (P. L. 880), sec. 313(c) of the SS Amendments of 1965 (P. L. 89-97).

[¶ 18,103] Indemnification of Employer

(b) Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

History:

Sec. 3102(b) of the Internal Revenue Code of 1954 (P. L. 591).

[¶ 18,104] Special Rule for Tips

(c)(1) In the case of tips which constitute wages, subsection (a) shall be applicable only to such tips as are included in a written statement furnished to the employer pursuant to section 6053(a), and only to the extent that collection can be made by the employer, at or after the time such statement is so furnished and before the close of the 10th day following the calendar month (or, if para-

graph (3) applies, the 30th day following the quarter) in which the tips were deemed paid, by deducting the amount of the tax from such wages of the employee (excluding tips, but including funds turned over by the employee to the employer pursuant to paragraph (2)) as are under control of the employer.

(2) If the tax imposed by section 3101, with respect to tips which are included in written statements furnished in any month to the employer pursuant to section 6053(a), exceeds the wages of the employee (excluding tips) from which the employer is required to collect the tax under paragraph (1), the employee may furnish to the employer on or before the 10th day of the following month (or, if paragraph (3) applies, on or before the 30th day of the following quarter) an amount of money equal to the amount of the excess.

(3) The Secretary or his delegate may, under regulations prescribed by him, authorize employers—

(A) to estimate the amount of tips that will be reported by the employee pursuant to section 6053(a) in any quarter of the calendar year,

(B) to determine the amount to be deducted upon each payment of wages (exclusive of tips) during such quarter as if the tips so estimated constituted the actual tips so reported, and

(C) to deduct upon any payment of wages (other than tips, but including funds turned over by the employee to the employer pursuant to paragraph (2)) to such employee during such quarter (and within 30 days thereafter) such amount as may be necessary to adjust the amount actually deducted upon such wages of the employee during the quarter to the amount required to be deducted in respect of tips included in written statements furnished to the employer during the quarter.

(4) If the tax imposed by section 3101 with respect to tips which constitute wages exceeds the portion of such tax which can be collected by the employer from the wages of the employee pursuant to paragraph (1) or paragraph (3), such excess shall be paid by the employee.

1965 Amendments:

Section 3102(c) was added by Sec. 313 (c)(1) of the SS Amendments of 1965, effective with respect to tips received after 1965.

History:

Sec. 313(c) of the SS Amendments of 1965 (P. L. 89-97).

SUBCHAPTER B—TAX ON EMPLOYERS

[¶ 18,111] RATE OF TAX

Sec. 3111. (a) OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE.—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

(1) with respect to wages paid during the calendar year 1968, the rate shall be 3.8 percent;

(2) with respect to wages paid during the calendar years 1969 and 1970, the rate shall be 4.2 percent;

(3) with respect to wages paid during the calendar years 1971 and 1972, the rate shall be 4.6 percent;

(4) with respect to wages paid during the calendar year 1973, the rate shall be 4.85 percent;

(5) with respect to wages paid during the calendar years 1974 through 2010, the rate shall be 4.95 percent; and

(6) with respect to wages paid after December 31, 2010, the rate shall be 5.95 percent.

(b) HOSPITAL INSURANCE.—In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

(1) with respect to wages paid during the calendar years 1968, 1969, 1970, 1971, and 1972, the rate shall be 0.60 percent;

(2) with respect to wages paid during the calendar year 1973, the rate shall be 1.0 percent;

(3) with respect to wages paid during the caelndar years 1974 through 1977, the rate shall be 0.90 percent;

(4) with respect to wages paid during the calendar years 1978 through 1980, the rate shall be 1.10 percent;

(5) with respect to wages paid during the calendar years 1981 through 1985, the rate shall be 1.35 percent; and

(6) with respect to wages paid after December 31, 1985, the rate shall be 1.50 percent.

1973 Amendments:

Section 6(a)(2) of P. L. 93-233, applicable only with respect to remuneration paid after December 31, 1973, substituted present paragraphs (a)(4) through (6) for the following:

"(4) with respect to wages paid during the calendar years 1973, 1974, 1975, 1976, and 1977, the rate shall be 4.85 percent;

"(5) with respect to wages paid during the calendar years 1978 through 2010, the rate shall be 4.80 percent; and

"(6) with respect to wages paid after December 31, 2010, the rate shall be 5.85 percent."

Section 6(b)(3) of P. L. 93-233, applicable only with respect to remuneration paid after December 31, 1973, substituted present paragraphs (b)(2) through (6) for the following:

"(2) with respect to wages paid during the calendar years, 1973, 1974, 1975, 1976, and 1977, the rate shall be 1.0 percent;

"(3) with respect to wages paid during the calendar years 1978, 1979, and 1980, the rate shall be 1.25 percent;

"(4) with respect to wages paid during the calendar years 1981, 1982, 1983, 1984, and 1985, the rate shall be 1.35 percent; and

"(5) with respect to wages paid after December 31, 1985, the rate shall be 1.45 percent."

1972 Amendments:

Section 204(a)(3) of P. L. 92-336, applicable only with respect to remuneration paid after December 31, 1972 (see, also, changes made by the SS Amendments of 1972, below), substituted "any of the calendar years 1971 through 1977" for "the calendar years 1971 and 1972" in paragraph (a)(3) and substituted paragraphs (a)(4) and (5) for the following:

"(4) with respect to wages paid during the calendar years 1973, 1974, and 1975, the rate shall be 5.0 percent; and

"(5) with respect to wages paid after December 31, 1975, the rate shall be 5.15 percent."

Section 204(b)(3) of P. L. 92-336, applicable only with respect to remuneration paid after December 31, 1972 (see, also, changes made by the SS Amendments of 1972, below), substituted paragraphs (b)(2) through (5) for the following:

"(2) with respect to wages paid during the calendar years 1973, 1974, and 1975, the rate shall be 0.65 percent;

"(3) with respect to wages paid during the calendar years 1976, 1977, 1978, and 1979, the rate shall be 0.70 percent;

"(4) with respect to wages paid during the calendar years 1980, 1981, 1982, 1983, 1984, 1985, and 1986, the rate shall be 0.80 percent; and

"(5) with respect to wages paid after December 31, 1986, the rate shall be 0.90 percent."

Section 135(a)(3) of the SS Amendments of 1972, applicable only with respect to remuneration paid after December 31, 1972, substituted "the calendar years 1971 and 1972" for "any of the calendar years 1971 through 1977" in paragraph (a)(3) and substituted paragraphs (a)(4), (5) and (6) for the following:

"(4) with respect to wages paid during any of the calendar years 1978 through 2010, the rate shall be 4.5 percent; and

"(5) with respect to wages paid after December 31, 2010, the rate shall be 5.35 percent."

Section 135(b)(3) of the SS Amendments of 1972, applicable only with respect to remuneration paid after December 31, 1972, substituted paragraphs (b)(2) through (5) for the following:

"(2) with respect to wages paid during the calendar years 1973, 1974, 1975, 1976, and 1977, the rate shall be 0.9 percent;

"(3) with respect to wages paid during the calendar years 1978, 1979, 1980, 1981, 1982, 1983, 1984, and 1985, the rate shall be 1.0 percent;

"(4) with respect to wages paid during the calendar years 1986, 1987, 1988, 1989, 1990, 1991, and 1992, the rate shall be 1.1 percent; and

"(5) with respect to wages paid after December 31, 1992, the rate shall be 1.2 percent."

1971 Amendments:

Section 204(a)(2) of P. L. 92-5, applicable with respect to remuneration paid after December 31, 1971, deleted "and" from the end of paragraph (a)(3) and substituted paragraph (a)(4) for the following:

"(4) with respect to wages paid after December 31, 1972, the rate shall be 5.0 percent."

Section 204(a)(2) also added paragraph (a)(5).

SUBCHAPTER C—GENERAL PROVISIONS

DEFINITIONS

[¶ 18,121] **Wages**

Sec. 3121. (a) For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

(1) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) [note: the amount is $14,100 for 1975, $15,300 for 1976, and $16,500 for 1977, as determined under section 230] with respect to employment has been paid to an individual by an employer during the calendar year with respect to which such contribution and benefit base is effective, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

(2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of—

(A) retirement, or

(B) sickness or accident disability, or

(C) medical or hospitalization expenses in connection with sickness or accident disability, or

(D) death;

(3) any payment made to an employee (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) on account of retirement;

(4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;

(5) any payment made to, or on behalf of, an employee or his beneficiary—

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501 (a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust,

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a), or

scribed by the Secretary or his delegate that the administration and collection costs involved would not warrant collection of the amount due.

[¶ 18,264] PROHIBITION OF ADMINISTRATIVE REVIEW OF DECISIONS

Sec. 6406. In the absence of fraud or mistake in mathematical calculation, the findings of fact in and the decision of the Secretary or his delegate upon the merits of any claim presented under or authorized by the internal revenue laws and the allowance or nonallowance by the Secretary or his delegate of interest on any credit or refund under the internal revenue laws shall not * * * be subject to review by any other administrative or accounting officer, employee, or agent of the United States.

[¶ 18,265] SPECIAL RULES APPLICABLE TO CERTAIN EMPLOYMENT TAXES

Sec. 6413. (a) ADJUSTMENT OF TAX.—

(1) GENERAL RULE.—If more than the correct amount of tax imposed by section 3101, 3111, * * * is paid with respect to any payment of remuneration, proper adjustments, with respect to both the tax and the amount to be deducted, shall be made, without interest, in such manner and at such times as the Secretary or his delegate may by regulations prescribe.

(2) UNITED STATES AS EMPLOYER.—For purposes of this subsection, in the case of remuneration received from the United States or a wholly-owned instrumentality thereof during any calendar year, each head of a Federal agency or instrumentality who makes a return pursuant to section 3122 and each agent, designated by the head of a Federal agency or instrumentality, who makes a return pursuant to such section shall be deemed a separate employer.

(3) GUAM OR AMERICAN SAMOA AS EMPLOYER.—For purposes of this subsection, in the case of remuneration received during any calendar year from the Government of Guam, the Government of American Samoa, a political subdivision of either, or any instrumentality of any one or more of the foregoing which is wholly owned thereby, the Governor of Guam, the Governor of American Samoa, and each agent designated by either who makes a return pursuant to section 3125 shall be deemed a separate employer.

(4) DISTRICT OF COLUMBIA AS EMPLOYER.—For purposes of this subsection, in the case of remuneration received during any calendar year from the District of Columbia or any instrumentality which is wholly owned thereby, the Commissioners of the District of Columbia and each agent designated by them who makes a return pursuant to section 3125 shall be deemed a separate employer.

(b) OVERPAYMENTS OF CERTAIN EMPLOYMENT TAXES.—If more than the correct amount of tax imposed by section 3101, 3111, * * * is paid or deducted with respect to any payment of remuneration and the overpayment cannot be adjusted under subsection (a) of this section, the amount of the overpayment shall be refunded in such manner and at such times (subject to the statute of limitations properly applicable thereto) as the Secretary or his delegate may by regulations prescribe.

(c) SPECIAL REFUNDS.—

(1) IN GENERAL.—If by reason of an employee receiving wages from more than one employer during a calendar year after the calendar year 1950 and prior to the calendar year 1955, the wages received by him during such year exceed $3,600, the employee shall be entitled (subject to the provisions of section 31(b)) to a credit or refund of any amount of tax, with respect to such wages, imposed by section 1400 of the Internal Revenue Code of 1939 and deducted from the employee's wages (whether or not paid to the Secretary or his delegate), which exceeds the tax with respect to the first $3,600 of such wages received; or if by reason of an employee receiving wages from more than one employer (A) during any calendar year after the calendar year 1954 and prior to the calendar year 1959, the wages received by him during such year exceed $4,200, or (B) during any calendar year after

of an individual with respect to any unpaid tax only after the district director or the director of the service center has notified such individual in writing of his intention to make such levy. Such notice shall be given in person, left at the dwelling or usual place of business of such individual, or shall be sent by mail to such individual's last known address, no less than 10 days before the day of levy. If a notice has been given under this paragraph with respect to an unpaid tax, no further notice is required in the case of successive levies with respect to such unpaid tax. The notice required to be given under this paragraph is in addition to, and may be given at the same time as, the notice and demand described in § 301.6303-1.

(2) *Jeopardy.* Subparagraph (1) of this paragraph shall not apply to a levy if the district director or director of the service center has made a finding under paragraph (a)(2) of this section that the collection of tax is in jeopardy.

(3) *Effective date.* This paragraph shall apply with respect to levies made after March 31, 1972. [As adopted, Dec. 31, 1954 (T. D. 6119); amended Aug. 11, 1971 (T. D. 7139); amended April 12, 1972 (T. D. 7180); amended Feb. 26, 1973, 38 F. R. 5171.]

.90 Unemployment benefit exempt from levy for delinquent federal taxes.— Congress intended the State employment commissions to use the money from the unemployment funds *solely* for the payment of unemployment compensation and certain refunds, and not for any other purpose. Accordingly, notices of levy to collect delinquent Federal taxes should not be served upon the State employment commission for the purpose of reaching weekly benefits payable to an unemployed taxpayer.

Rev. Rul. 54-171 (CB 1954-1, 282).

• *Regulations*

[¶ 11,256] [Amounts Treated as Overpayments]

[⟹ Regulations having special application to employment taxes (26 CFR Part 31) have not been issued under Code Secs. 6401(a) and (c) (¶ 18,261). For the regulations of general application (26 CFR Part 301) under these sections of the Code, see .65, below.]

.65 Regulation § 301.6401-1. Amounts treated as overpayments.— (a) The term "overpayment" includes:

(1) Any payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation applicable thereto.

(2) Any amount allowable for a taxable year as a credit under sections 31 (relating to tax withheld on wages), 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), and 667(b) (relating to taxes paid by certain trusts) which exceeds the tax imposed by subtitle A of the Code (reduced by the credits allowable under subpart A of part IV of subchapter A of chapter 1 of the Code, other than the credits allowable under sections 31 and 39) for such year.

(b) An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid. [As adopted, Dec. 31, 1954 (T. D. 6119); amended Aug. 24, 1972 (T. D. 7204).]

• *Regulations*

[¶ 11,259] Credits or Refunds

§ 31.6402(a)-1. (a) In general.—For regulations under section 6402 of special application to credits or refunds of employment taxes, see §§ 31.6402(a)-2, 31.6402(a)-3, and 31.6414-1. For regulations under section 6402 of general application to credits or refunds, see §§ 301.6402-1 [.80, below] and 301.6402-2 [.85, below] of this chapter (Regulations on Procedure and Administration). For provisions relating to credits of employment taxes which constitute adjustments without interest, see §§ 31.6413(a)-1 and 31.6413(a)-2.

(b) Period of limitation.—For the period of limitation upon credit or refund of taxes imposed by the Internal Revenue Code of 1954, see § 301.6511(a)-1 of this chapter (Regulations on Procedure and Administration) [see ¶ 11,294.65]. For the period of limitation upon credit or refund of any tax imposed by the Internal Revenue Code of 1939, see the regulations applicable with respect to such tax.

.01 Source.—T. D. 6472, 25 F. R. 5723, June 22, 1960, republished in T. D. 6516, 25 F. R. 13032, Dec. 20, 1960.

.02 Law.—See IRC Sec. 6402(a) at ¶ 18,262.

[¶ 11,260] Credits or Refunds

• • *CCH Explanation*

.05 **Credit or refund of F. I. C. A. taxes.**—If more than the correct amount of employer tax, penalty, or interest is paid to the District Director, the employer may file a claim for refund on Form 843 or take a credit for the overpayment on any subsequent return. Concerning the adjustment of overpaid employer taxes, see ¶ 11,278 *et seq.* Concerning credit or refund of overpaid employer taxes, see ¶ 11,263 *et seq.*

If an overpayment of employee tax is not adjustable, a claim for credit or refund may be filed on Form 843. With respect to the claim of an employer for refund, credit, or abatement of overpaid employee tax collected from an employee, see ¶ 11,263 *et seq.* With respect to employee claims for refund or credit of an unadjustable overcollection of employee tax, see ¶ 11,263 *et seq.* Adjustments of overpayments or overcollections of employee tax are discussed at ¶ 11,275, 11,278 and 11,281.

So-called "special refunds" of employee tax—arising in cases where an employee overpays his tax by reason of working for more than one employer during the year—are discussed at ¶ 11,284 *et seq.*

For a discussion of notices and statements required to be furnished by railroad employers with respect to excess taxes paid by employees who are employed in dual jobs covered by both social security and railroad retirement, see ¶ 11,285.051.

.07 **Refund of unemployment taxes.**—If more than the correct amount of tax, penalty, or interest is paid to the District Director under the Federal Unemployment Tax Act, the employer may file a claim for refund of the overpayment on Form 843. The refund of federal unemployment taxes is discussed at ¶ 11,266.

Some employers have made the mistake of depositing state unemployment insurance taxes along with their quarterly deposits of the federal unemployment insurance tax, instead of paying them to the state agency. For the employer who has made this mistake, the Office of the Fiscal Assistant Secretary, U. S. Treasury Department, advises that a refund may be obtained by mail. The employer should write to the appropriate federal reserve bank, which, if he made the deposit with a commercial bank, may entail contacting the commercial bank to obtain the name and address of the federal bank. In his letter, he should give a full description of the payment, including (1) his complete name and address, (2) his federal employer identification number, (3) his state employer account number, (4) the date of the payment, (5) the tax period involved, (6) the total amount of the deposit, both federal and state, and (7) the amount of state tax that he wants refunded. A refund from the federal reserve bank may then be expected in approximately two weeks.

.55 **Adjustment, refund, or credit with respect to self-employment taxes.**—It is the policy of the Internal Revenue Service to adjust self-employment tax liabilities on the basis of information contained in Form OAR-7000, Notice of Determination of Self-Employment Income, furnished by the Social Security Administration in connection with examinations made by that agency where claims for benefits are filed, and to refund overpaid self-employment taxes without requiring taxpayers to file a claim on Form 843, Claim, provided such form can be processed before the expiration of the statutory period of limitations. Although the Commissioner in these cases may have before him information showing the grounds upon which a taxpayer's right to the allowance of a refund of self-employment tax rests, it is the position of the Service that Form OAR-7000 (or Form OAR-7010 when used by the Social Security Administration for self-employment purposes) cannot be considered a claim for refund or credit for overpaid taxes because such form does not meet the basic requirements of a claim as prescribed by the Internal Revenue Code and the regulations thereunder. Therefore, in cases where the self-employment tax has been overpaid, the taxpayer should file a claim for refund (Form 843) prior to the expiration of the statutory period of limitations.

Rev. Rul. 56-297 (CB 1956-1, 564).

.75 **Payment not under protest.**—The right to a refund or credit of taxes imposed under Titles VIII and IX [Federal Insurance Contributions Act and Federal Unemployment Tax Act] of the Act is not dependent upon whether such taxes were paid under protest.

S. S. T. 235 (CB 1937-2, 378).

.78 **Refund of taxes not paid in accordance with formal requirements.**—FICA taxes paid with respect to wages of employees of a charitable institution, although the necessary waiver of exemption had not been filed, are not refundable, but are retroactively credited to the employees.

Methodist Home and Hotel Corp. v. U. S., DC. S. Dist. of Tex., 291 F. Supp. 595 (1968).

.80 **Regulation § 301.6402-1. Authority to make credits or refunds.**—The Commissioner, within the applicable period of limitations, may credit any overpayment of tax, including interest thereon, against any outstanding liability for any tax (or for any interest, additional amount, addition to the tax, or assessable penalty) owed by the person making the overpayment, and the balance, if any, shall be refunded to such person by the Commissioner. [As adopted, Dec. 31, 1954 (T. D. 6119).]

.85 **Regulation § 301.6402-2. Claims for credit or refund.**—(a) *Requirement that claim be filed.* (1) Credits or refunds of overpayments may not be allowed or made after the expiration of the statutory period of limitation properly applicable unless, before the expiration of such period, a claim therefor has been filed by the taxpayer. Furthermore, under section 7422, a civil action for refund may not be instituted unless a claim has been filed within the properly applicable period of limitation.

(2) In the case of a claim filed prior to April 15,. 1968, the claim together with appropriate supporting evidence shall be filed in the office of the internal revenue officer to whom the tax was paid or with the assistant regional commissioner (alcohol, tobacco, and firearms) where the regulations respecting the particular tax to which the claim relates specifically require the claim to be filed with that officer. Except as provided in paragraph (b) of § 301.6091-1 (relating to hand-carried documents), in the case of a claim filed after April 14, 1968, the claim, together with appropriate supporting evidence, shall be filed (i) with the Director of International Operations if the tax was paid to him or (ii) with the assistant regional commissioner (alcohol, tobacco, and firearms) where the regulations respecting the particular tax to which the claim relates specifically require the claim to be filed with that officer; otherwise, the claim with appropriate supporting evidence must be filed with the service center serving the internal revenue district in which the tax was paid. As to interest in the case of credits or refunds, see section 6611. See section 7502 for provisions treating timely mailing as timely filing and section 7503 for time for filing claim when the last day falls on Saturday, Sunday, or legal holiday.

(b) *Grounds set forth in claim.* (1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

(2) Neither the district director nor the director of the regional service center has authority to refund on equitable grounds penalties or other amounts legally collected.

(c) *Form for filing claim.* Except for claims filed after June 30, 1976 for the refunding of overpayment of income taxes, all

claims by taxpayers for the refunding of taxes, interest, penalties, and additions to tax shall be made on Form 843. For special rules applicable to income tax, see § 301.6402-3. For other provisions relating to credits and refunds of taxes other than income tax, see the regulations relating to the particular tax.

(d) *Separate claims for separate taxable periods.* In the case of income, gift, and Federal unemployment taxes, a separate claim shall be made for each type of tax for each taxable year or period.

(e) *Proof of representative capacity.* If a return is filed by an individual and, after his death, a refund claim is filed by his legal representative, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the legal representative to file the claim. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter a refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made in the claim showing that the return was filed by the fiduciary and that the latter is still acting. In such cases, if a refund is to be paid, letters testamentary, letters of administration, or other evidence may be required, but should be submitted only upon the receipt of a specific request therefor. If a claim is filed by a fiduciary other than the one by whom the return was filed, the necessary documentary evidence should accompany the claim. A claim may be executed by an agent of the person assessed, but in such case a power of attorney must accompany the claim.

(f) *Mailing of refund check.* (1) Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and, except as provided in subparagraph (2) of this paragraph, the checks may be sent direct to the claimant or to such person in care of an attorney or agent who has filed a power of attorney specifically authorizing him to receive such checks.

(2) Checks in payment of claims which have either been reduced to judgment or settled in the course or as a result of litigation will be drawn in the name of the person or persons entitled to the money and, in the case of actions arising in the United States district courts, will be sent to the appropriate United States attorney and, in actions arising in the United States Court of Claims, to the Assistant Attorney General, Tax Division, Department of Justice, for delivery to the taxpayer or the counsel of record in the court proceeding.

(3) For restrictions on the assignment of claims, see section 3477 of the Revised Statutes (31 U. S. C. 203). [As amended, T. D. 6585, Dec. 27, 1961, T. D. 6950, 33 F. R. 5354, Apr. 4, 1968 (corrected, I. R. B. 1968-24, 7) 34 F. R. 3673, T. D. 7008, Mar. 1, 1969, T. D. 7188, June 28, 1972, and T. D. 7410, Mar. 9, 1976.]

.95 Time for performing certain acts postponed by reason of war.—Sec. 7508(a) of the 1954 Code extends the time during which certain acts, such as filing claims for credits or refunds of taxes, must be performed in cases where it is impracticable or impossible for persons to perform such acts by reason of their serving in the armed forces in an area designated as a "combat zone," or by reason of their being continuously hospitalized outside the United States as a result of an injury received in such zone.—CCH.

• *Regulations*

[¶ 11,263] Credit or Refund of Tax Under Federal Insurance Contributions Act or Railroad Retirement Tax Act

§ 31.6402(a)-2. (a) Claim by person who paid tax to district director.—(1) *In general.* Any person who pays to the district director more than the correct amount of—

(i) Employee tax under section 3101, or employer tax under section 3111, of the Federal Insurance Contributions Act,

(ii) Employee tax under section 3201, employee representative tax under section 3211, or employer tax under section 3221, of the Railroad Retirement Tax Act,

(iii) Any such tax under a corresponding provision of prior law, or

(iv) Interest, addition to the tax, additional amount, or penalty with respect to any such tax,

may file a claim for refund of the overpayment (except to the extent that the overpayment must be credited pursuant to § 31.3503-1), or may claim credit

for such overpayment, in the manner and subject to the conditions stated in this section and § 301.6402-2 [¶ 11,260.85] of this chapter (Regulations on Procedure and Administration). If credit is claimed pursuant to this section, the amount thereof shall be claimed by entering such amount as a deduction on a return filed by the person making the claim. The return on which the credit is claimed must be on a form which is prescribed for use, at the time of the claim, in reporting tax which corresponds to the tax overpaid. If credit is taken pursuant to this section, a claim on Form 843 is not required, but the return on which the credit is claimed shall have attached as a part thereof a statement which shall constitute the claim for credit, setting forth in detail the grounds and facts relied upon in support of the credit, designating the return period in which the error was ascertained, and setting forth such other information as may be required by the regulations in this subpart and by the instructions relating to the return. No refund or credit of employee tax under the Federal Insurance Contributions Act shall be allowed if for any reason (for example, an overcollection of employee tax having been inadvertently included by the employee in computing a special refund—see § 31.6413(c)-1) the employee has taken the amount of such tax into account in claiming a credit against, or refund of, his income tax, or if so, such claim has been rejected.

(2) *Statements supporting employers' claims for employee tax.* (i) Every claim filed by an employer for refund or credit of employee tax under section 3101 or section 3201, or a corresponding provision of prior law, collected from an employee shall include a statement that the employer has repaid the tax to such employee or has secured the written consent of such employee to allowance of the refund or credit. The employer shall retain as part of his records the written receipt of the employee showing the date and amount of the repayment, or the written consent of the employee, whichever is used in support of the claim.

(ii) Every claim filed by an employer for refund or credit of employee tax under section 3101, or a corresponding provision of prior law, collected from an employee in a calendar year prior to the year in which the credit or refund is claimed, also shall include a statement that the employer has obtained from the employee a written statement (*a*) that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (*b*) that the employee will not claim refund or credit of such amount. The employer shall retain the employee's written statement as part of the employer's records.

(b) **Claim by employee.**—(1) *In general.* If more than the correct amount of employee tax under section 3101 or section 3201, or a corresponding provision of prior law, is collected by an employer from an employee and paid to the district director, the employee may file a claim for refund of the overpayment if (i) the employee does not receive reimbursement in any manner from the employer and does not authorize the employer to file a claim and receive refund or credit, (ii) the overcollection cannot be corrected under § 31.3503-1, and (iii) in the case of employee tax under section 3101 or a corresponding provision of prior law, the employee has not taken the overcollection into account in claiming a credit against, or refund of, his income tax, or if so, such claim has been rejected. See § 31.6413(c)-1.

(2) *Statements supporting employee's claim.* (i) Each employee who makes a claim under subparagraph (1) of this paragraph shall submit with such claim a statement setting forth (*a*) the extent, if any, to which the employer has reimbursed the employee in any manner for the overcollection, and (*b*) the amount, if any, of credit or refund of such overpayment claimed by the

employer or authorized by the employee to be claimed by the employer. The employee shall obtain such statement, if possible, from the employer, who should include in such statement the fact that it is made in support of a claim against the United States to be filed by the employee for refund of employee tax paid by such employer to the district director. If the employer's statement is not submitted with the claim, the employee shall make the statement to the best of his knowledge and belief, and shall include therein an explanation of his inability to obtain the statement from the employer.

(ii) Each individual who makes a claim under subparagraph (1) of this paragraph for refund of employee tax under section 3101, or a corresponding provision of prior law, also shall submit with such claim a statement setting forth whether the individual has taken the amount of the overcollection into account in claiming a credit against, or refund of, his income tax, and the amount, if any, so claimed (see § 31.6413(c)-1).

(c) **Statements to accompany employers' and employees' claims under the Federal Insurance Contributions Act.**—Whenever a claim for credit or refund of employee tax under section 3101, employer tax under section 3111, or either such tax under a corresponding provision of prior law, is made with respect to remuneration which was erroneously reported on a return or schedule as wages paid to an employee, such claim shall include a statement showing (1) the identification number of the employer, if he was required to make application therefor, (2) the name and account number of such employee, (3) the period covered by such return or schedule, (4) the amount of remuneration actually reported as wages for such employee, and (5) the amount of wages which should have been reported for such employee. No particular form is prescribed for making such statement, but if printed forms are desired, the district director will supply copies of Form 941c or Form 941c PR, whichever is appropriate, upon request.

.01 Source.—T. D. 6472, 25 F. R. 5723, June 22, 1960; republished in T. D. 6516, 25 F. R. 13032, Dec. 20, 1960.

.02 Law.—See IRC Sec. 6402(a) at ¶ 18,262.

[¶ 11,264] Credit or Refund of F. I. C. A. Taxes

• • *CCH Explanation*

.05 **Refund or credit of employer tax.**—If more than the correct amount of employer tax, penalty, or interest is paid to the District Director, the employer may file a claim for refund on Form 843, or take a credit for the overpayment on any subsequent return. If more than the correct amount of tax, penalty, or interest is assessed but not paid to the District Director, the person against whom the assessment is made may file a claim for abatement of the overassessment. (See ¶ 11,269.)

.07 **Refund or credit of employee tax.**—If an overpayment of employee tax is not adjustable and the period of limitation on credit or refund has not expired (see ¶ 11,294), a claim for credit or refund should be filed on Form 843. Claims filed by an employer for refund, credit, or abatement of employee tax collected from an employee must include a statement by the employer (1) that the employer has repaid the tax to the employee or has secured the written consent of such employee to allowance of the refund, credit, or abatement, and (2) that the employer has obtained from the employee a written statement to the effect that the employee has not claimed and will not claim

• • *CCH Explanation*

refund or credit of the amount of the overcollection. Form 5071 is used by the employer in making the required statement. See, further, ¶ 11,263, above.

If (1) an employer collects more than the correct amount of employee tax and pays it to the District Director, and (2) the employee has not claimed reimbursement through credit against, or refund of, his income tax (or if so claimed, the claim has been rejected), and (3) the employee does not receive reimbursement in any manner from such employer and does not authorize the employer to file a claim and receive refund or credit, then the employee may file a claim for refund of the overpayment on Form 843.

.09 Special employee refunds are discussed at ¶ 11,284 et seq.

.11 With respect to the period of limitation on filing claim for credit or refund, see ¶ 11,294.

.85 **Termination of employment relationship with alien employee.**—A claim for refund of taxes imposed under the FICA will not be allowed with regard to an alien who, after performing services in the United States that constituted "employment," returns to his home country. The termination of relationship of employer and employee or the fact that an employee ceases to perform services in "employment" does not affect the liability incurred for the taxes under the Act on account of services that constitute "employment". The fact that the alien employee has no intention of performing services in "employment" in the United States in the future is immaterial.

Rev. Rul. 70-437 (CB 1970-2, 200), superseding S. S. T. 216 (CB 1937-2, 378).

Liability properly incurred for FICA taxes is not affected, nor does a refund or credit accrue to the company or employee, by reason of the employee's subsequent discharge or resignation.

Rev. Rul. 68-492 (CB 1968-2, 417), superseding S. S. T. 162 (CB 1937-1, 356).

A right to refund or credit of the taxes imposed under Titles VIII and IX [Federal Insurance Contributions Act and Federal Unemployment Tax Act] of the Social Security Act does accrue, however, where an employee, upon termination of the relationship of employer and employee, repays to his employer amounts advanced in excess of the commissions or other remuneration earned by such employee.

S. S. T. 316 (CB 1938-2, 275).

• *Regulations*

[¶ 11,266] Refund of Federal Unemployment Tax

§ 31.6402(a)-3. Any person who pays to the district director more than the correct amount of—

(a) Tax under section 3301 of the Federal Unemployment Tax Act or a corresponding provision of prior law, or

(b) Interest, addition to the tax, additional amount, or penalty with respect to such tax,

may file a claim for refund of the overpayment, in the manner and subject to the conditions stated in § 301.6402-2 of this chapter (Regulations on Procedure and Administration) [¶ 11,260.85]. See § 31.6413(d) and the corresponding section of prior law for provisions which bar the allowance or payment of interest on the amount of any refund based on credit allowable for contributions paid under the unemployment compensation law of a State.

.01 **Source.**—T. D. 6472, 25 F. R. 5723, June 22, 1960; republished in T. D. 6516, 25 F. R. 13032, Dec. 20, 1960.

.02 **Law.**—See IRC Sec. 6402(a) at ¶ 18,262.

.25 **Refunds in the case of erroneous or illegal collection.**—Sec. 1601(d) of the 1939 Code, and its successor section 6413(d) of the 1954 Code, does not bar a taxpayer's right to statutory interest on a refund of federal unemployment tax where the refund

results from an erroneous or illegal collection. The prohibition of interest in these sections with respect to overpayments was intended by Congress to apply to situations where the taxpayer, at the time he files his federal unemployment tax return, is not entitled to take credits against the tax but later, either through payments into state unemployment funds or changes in the law, is entitled to take a credit for such payments.

General Dynamics Corp. v. U. S., U. S. Ct. of Claims, No. 258-62, 11/15/63.

• *Regulations*

[¶ 11,269] Abatements

§ 31.6404(a)-1. For regulations under section 6404 of general application to the abatement of taxes, see § 301.6404-1 of this chapter (Regulations on Procedure and Administration) [.65, below]. Every claim filed by an employer for abatement of employee tax under section 3101 or section 3201, or a corresponding provision of prior law, shall be made in the manner and subject to the conditions stated in paragraphs (a)(2) and (c) of § 31.6402(a)-2, as if the claim for abatement were a claim for refund.

.01 Source.—T. D. 6472, 25 F. R. 5723, June 22, 1960; republished in T. D. 6516, 25 F. R. 13032, Dec. 20, 1960.

.02 Law.—See IRC Sec. 6404(a) at ¶ 18,263.

.65 Regulation § 301.6404-1. Abatements. —(a) The district director or the director of the regional service center may abate any assessment, or unpaid portion thereof, if the assessment is in excess of the correct tax liability, if the assessment is made subsequent to the expiration of the period of limitations applicable thereto, or if the assessment has been erroneously or illegally made.

(b) No claim for abatement may be filed with respect to income, estate, or gift tax.

(c) Except in case of income, estate, or gift tax, if more than the correct amount of tax, interest, additional amount, addition to the tax, or assessable penalty is assessed but not paid to the district director, the person against whom the assessment is made may file a claim for abatement of such overassessment. Each claim for abatement under this section shall be made on Form 843. In the case of a claim filed prior to April 15, 1968, the claim shall be filed in the office of the internal revenue officer by whom the tax was assessed or with the assistant regional commissioner (alcohol, tobacco, and firearms) where the regulations respecting the particular tax to which the claim relates specifically require the claim to be filed with that officer. Except as provided in paragraph (b) of § 301.6091-1 (relating to hand-carried documents), in the case of a claim filed after April 14, 1968, the claim shall be filed (1) with the Director of International Operations if the tax was assessed by him, or (2) with the assistant regional commissioner (alcohol, tobacco, and firearms) where the regulations respecting the particular tax to which the claim relates specifically require the claim to be filed with that officer; otherwise, the claim shall be filed with the service center serving the internal revenue district in which the tax was assessed. Form 843 shall be made in accordance with the instructions relating to such form.

(d) The Commissioner may issue uniform instructions to district directors authorizing them, to the extent permitted in such instructions, to abate amounts the collection of which is not warranted because of the administration and collection costs. [As amended, 34 F. R. 3673, Mar. 1, 1969 (T. D. 7008); amended June 28, 1972 (T. D. 7188).]

• *Regulations*

[¶ 11,275] Repayment by Employer of Tax Erroneously Collected from Employee

§ 31.6413(a)-1. (a) Before employer files return.—(1) *Employee tax under the Federal Insurance Contributions Act or the Railroad Retirement Tax Act.* (i) If an employer—

(*a*) During any return period collects from an employee more than the correct amount of tax under section 3101 or section 3201, or a corresponding provision of prior law,

(*b*) Repays the amount of the overcollection to the employee before the return for such period is filed with the district director, and

(*c*) Obtains and keeps as part of his records the written receipt of the employee showing the date and amount of the repayment,

the employer shall not report on any return or pay to the district director the amount of the overcollection.

(ii) Any overcollection not repaid to and receipted for by the employee as provided in subdivision (i) of this subparagraph shall be reported and paid to the district director with the return for the return period in which the overcollection was made. Such return shall be accompanied by a statement explaining the overcollection, setting forth the account number (if known) and name of the individual from whom the overcollection was made, and showing the total amount overcollected from and not repaid to the individual. If the employer is not required to make a return for such period, the employer nevertheless shall furnish to the district director a statement as described in the preceding sentence, on or before the date fixed for filing a return for such period, and shall pay the amount of the overcollection with such statement.

(2) *Income tax withheld from wages.* * * *

(b) After employer files return.—(1) *Employee tax under the Federal Insurance Contributions Act or the Railroad Retirement Tax Act.* (i) If an employer collects from any employee and pays to the district director more than the correct amount of employee tax under section 3101 or section 3201, or a corresponding provision of prior law, and if the error is ascertained within the applicable period of limitation on credit or refund, the employer shall repay or reimburse the employee in the amount thereof prior to the expiration of the return period following the return period in which the error is ascertained and prior to the expiration of such limitation period. This subparagraph has no application in any case in which an overcollection is made the subject of a claim by the employer for refund or credit, and the employer elects to secure the written consent of the employee to the allowance of the refund or credit under the procedure provided in paragraph (a)(2)(i) of § 31.6402(a)-2.

(ii) If the amount of an overcollection is repaid to an employee, the employer shall obtain and keep as part of his records the written receipt of the employee, showing the date and amount of the repayment. If, in any calendar year, an employer repays or reimburses an employee in the amount of an overcollection of employee tax under section 3101, or a corresponding provision of prior law, which was collected from the employee in a prior calendar year, the employer shall obtain from the employee and keep as part of his records a written statement (*a*) that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (*b*) that the employee will not claim refund or credit of such amount. See § 31.6413(c)-1.

(iii) If the employer does not repay the employee the amount overcollected, the employer shall reimburse the employee by applying the amount of the overcollection against the employee tax which attaches to wages or compensation paid to the employee prior to the expiration of the return period following the return period in which the error is ascertained and prior to the expiration of the applicable period of limitation on credit or refund. If the amount of the overcollection exceeds the amount so applied against such employee tax, the excess amount shall be repaid to the employee as required by this subparagraph.

(iv) For purposes of this subparagraph, an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(v) For the period of limitation upon credit or refund of taxes imposed by the Internal Revenue Code of 1954, see § 301.6511(a)-1 of this chapter

(Regulations on Procedure and Administration) [see ¶ 11,293.65]. For the period of limitation upon credit or refund of any tax imposed by the Internal Revenue Code of 1939, see the regulations applicable with respect to such tax.

(2) *Income tax withheld from wages.* * * *

.01 Source.—T. D. 6472, 25 F. R. 5723, June 22, 1960; republished in T. D. 6516, 25 F. R. 13032, Dec. 20, 1960.

.02 Law.—See IRC Sec. 6413(a) at ¶ 18,265.

[¶ 11,276] Reimbursement of Overcollections of Employee Tax

• • *CCH Explanation*

.05 **Overcollections of employee tax.**—Overcollections of employee tax are adjusted as follows: (1) If an employer (a) collects more than the correct amount of employee tax from an employee during any tax-return period, and (b) repays the amount of the overcollection to the employee prior to the time the return is filed, and (c) obtains and keeps as part of his records a written receipt of the employee, showing the date and amount of the repayment, the overcollection does not have to be reported on a return or paid to the District Director. Any overcollection not repaid to and receipted by the employee as described in the foregoing must be reported and paid to the District Director with the return for the period in which the overcollection was made. (2) If an employer collects and pays to the District Director more than the correct amount of employee tax, the employer should adjust the overcollection by repaying or reimbursing the employee; however, an overcollection in one calendar year is not adjustable in a subsequent calendar year unless the employer obtains a written statement from the employee that he has not and will not claim refund or credit of the amount of the overcollection. If the amount of the overcollection is repaid, the employer must obtain and keep as part of his records a written receipt of the employee showing the date and amount of the repayment. If the employer does not repay the employee, then he must reimburse him by applying the amount of the overcollection against the tax which attaches to wages paid to the employee prior to the expiration of the tax-return period following the tax-return period in which the error is ascertained, the excess, if any, being repaid to the employee.

Overcollections described under (2), above, are adjustable only if completed prior to the expiration of the tax-return period following the tax-return period in which the error is ascertained, and then only if the adjustment is reported on a return filed within the statutory period of limitation on credits and refunds. A claim for credit or refund may be filed within the period of limitation for any overcollection of employee tax which cannot be adjusted as described under (2), above.

The period of limitation on credit or refund of both the employer and employee tax is discussed at ¶ 11,294, below.

• *Regulations*

[¶ 11,278] Adjustment of Overpayments

§ 31.6413(a)-2. (a) Taxes under the Federal Insurance Contributions Act or the Railroad Retirement Tax Act.—(1) *Employee tax.* After an

employer repays or reimburses an employee in the amount of an overcollection, as provided in paragraph (b)(1) of § 31.6413(a)-1, the employer may claim credit for such amount in the manner, and subject to the conditions, stated in § 31.6402(a)-2. Such credit shall constitute an adjustment, without interest, if the amount thereof is entered on a return for a period ending on or before the last day of the return period following the return period in which the error was ascertained. No credit or adjustment in respect of an overpayment shall be entered on a return after the filing of a claim for refund of such overpayment.

(2) *Employer tax.* If an employer pays more than the correct amount of employer tax under section 3111 or section 3221, or a corresponding provision of prior law, the employer may claim credit for the amount of the overpayment in the manner, and subject to the conditions, stated in § 31.6402(a)-2. Such credit shall constitute an adjustment, without interest, if the amount thereof is entered on the same return on which the employer adjusts, pursuant to subparagraph (1) of this paragraph, a corresponding overpayment of employee tax.

(b) Income tax withheld from wages. * * *

.01 Source.—T. D. 6472, 25 F. R. 5723, June 22, 1960; republished in T. D. 6516, 25 F. R. 13032, Dec. 20, 1960.

.02 Law.—See IRC Sec. 6413(a) at ¶ 18,265.

[¶ 11,279] Adjustment of Overpaid F. I. C. A. Tax

• • *CCH Explanation*

.05 **Adjustment of overpaid employee tax.**—If an employer pays more than the correct amount of employer tax and he is required to make a corresponding adjustment with respect to an overpayment of employee tax on the same payment of remuneration, the employer is required to adjust the overpayment of employer tax to the same extent and on the same return or returns on which the adjustment of employee tax is reported. The adjustment is made by deducting the amount of the overpayment from the amount of employer tax reported on such return or returns. No overpayment can be adjusted in this manner if the statutory period of limitations on credit or refund has expired (see ¶ 11,293), or if an overpayment of employer tax is made without a corresponding overpayment of employee tax. In the latter case, an employer should file claim for credit or refund.

.07 **Adjustment of overpaid employer tax.**—If an employer pays more than the correct amount of employer tax, he may claim credit for the amount of the overpayment as described at ¶ 11,263 *et seq.* Such credit constitutes an adjustment, without interest, if the amount thereof is entered on the same return on which the employer adjusts corresponding overpayment of employee tax, as described above.

• *Regulations*

[¶ 11,281] Overpayments of Certain Employment Taxes

§ 31.6413(b)-1. For provisions relating to the adjustment of overpayments of tax imposed by section 3101, 3111, 3201, 3221, or 3402, see § 31.6413(a)-2.

For provisions relating to refunds of tax imposed by section 3101, 3111, 3201, or 3221, see §§ 31.6402(a)-1 and 31.6402(a)-2. For provisions relating to refunds of tax imposed by section 3402, see §§ 31.6402(a)-1 and 31.6414-1.

.01 Source.—T. D. 6472, 25 F. R. 5723, June 22, 1960; republished in T. D. 6516, 25 F. R. 13032, Dec. 20, 1960.

.02 Law.—See IRC Sec. 6413(b) at ¶ 18,265.

• *Regulations*

[¶ 11,284] Special Refunds

§ 31.6413(c)-1. (a) Who may make claims.—(1) *In general.* (i) If an employee receives wages, as defined in section 3121(a), from two or more employers in any calendar year:

(*a*) After 1954 and before 1959 in excess of $4,200,

(*b*) After 1958 and before 1966 in excess of $4,800,

(*c*) After 1965 and before 1968 in excess of $6,600,

(*d*) After 1967 and before 1972 in excess of $7,800,

(*e*) After 1971 and before 1973 in excess of $9,000,

(*f*) After 1972 and before 1974 in excess of $10,800,

(*g*) After 1973 and before 1975 in excess of $13,200, or

(*h*) After 1974 in excess of the contribution and benefit base (as determined under section 230 of the Social Security Act) which is effective with respect to such year,

the employee shall be entitled to a special refund of the amount, if any, by which the employee tax imposed by section 3101 with respect to such wages and deducted therefrom (whether or not paid) exceeds the employee tax with respect to the amount specified in (*a*) through (*h*) of this subdivision for the calendar year in question. Employee tax imposed by section 3101 with respect to tips reported by an employee to his employer and collected by the employer from funds turned over by the employee to the employer (see section 3102(c)) shall be treated, for purposes of this paragraph, as employee tax deducted from wages received by the employee. If the employee is required to file an income tax return for such calendar year (or for his last taxable year beginning in such calendar year) he may obtain the benefit of the special refund only by claiming credit as provided in § 1.21-2 of this chapter (Income Tax Regulations).

(ii) The application of this subparagraph may be illustrated by the following examples:

Example (1). Employee A in the calendar year 1968 receives taxable wages in the amount of $5,000 from each of his employers, B, C, and D, for services performed during such year (or at any time after 1936), or a total of $15,000. Employee tax (computed at 4.4 percent, the aggregate employee tax rate in effect in 1968) is deducted from A's wages in the amount of $220 by B and $220 by C, or a total of $440. Employer D pays employee tax in the amount of $220 without deducting such tax from A's wages. The employee tax with respect to the first $7,800 of such wages is $343.20. A is entitled to a special refund of $96.80 ($440 minus $343.20). The $5,000 of wages received from employer D and the $220 of employee tax paid with respect thereto have no bearing in computing A's special refund since such tax was not deducted from his wages.

(iii) The total amount of wages as defined in section 3121(a), and

(iv) The total amount of employee tax deducted and withheld from such wages (increased by any adjustment in such year for overcollection, or decreased by any adjustment in such year for undercollection, of employee tax during any prior year) and the proportion thereof (expressed either as a dollar amount, as a percentage of the total amount of wages as defined in section 3121(a), or as a percentage of the total amount of employee tax under section 3101) withheld as tax under section 3101(b) for financing the cost of hospital insurance benefits.

See paragraph (d) of this section for provisions relating to the time for furnishing the statement required by this paragraph.

(2) *Uniformed services.* In the case of remuneration paid for service described in section 3121(m), relating to service in the uniformed services, performed after 1956, "wages as defined in section 3121(a)", as used in section 6051(a)(5), shall be determined in accordance with section 3121(i)(2) and section 3122.

(c) Correction of statements.—(1) *Federal Insurance Contributions Act.* If (i) the amount of employee tax under section 3101 deducted and withheld in the calendar year from the wages, as defined in section 3121(a), paid during such year was less or greater than the tax imposed by section 3101 on such wages by reason of the adjustment in such year of an overcollection or undercollection of the tax in any prior year, or (ii) regardless of the reason for the error or the method of its correction, the amount of wages as defined in section 3121(a), or tax under section 3101, entered on a statement furnished pursuant to this section to an employee for a prior year was incorrect, a corrected statement for such prior year reflecting the adjustment or the correct data shall be furnished to the employee. Such statement shall be marked "Corrected by Employer."

(2) *Income tax withholding.* A corrected statement shall be furnished to the employee with respect to a prior calendar year (i) to show the correct amount of wages, as defined in section 3401(a), paid during the prior calendar year if the amount of such wages entered on a statement furnished to the employee for such prior year is incorrect, or (ii) to show the amount actually deducted and withheld as tax under section 3402 if such amount is less or greater than the amount entered as tax withheld on the statement furnished the employee for such prior year. Such statement shall be indicated as corrected.

(3) *Cross reference.* For provisions relating to the disposition of the Internal Revenue Service copy of a corrected statement, see paragraph (b)(2) of § 31.6011(a)-4 and paragraph (b) of § 31.6051-2.

* * *

(d) Time for furnishing statements.—(1) *In general.* Each statement required by this section for a calendar year and each corrected statement required for the year shall be furnished to the employee on or before January 31 of the year succeeding such calendar year, or, if his employment is terminated before the close of such calendar year, on or before the 30th day after the day on which the last payment of wages is made. For provisions relating to the filing of the Internal Revenue Service copies of the statement, see § 31.6051-2.

(2) *Extensions of time.* (i) For good cause shown upon written application by an employer, the district director or director of a service center may grant an extension of time not exceeding 30 days in which to furnish to employees the statements required by this section. Each application for an extension of time under this subdivision shall be made in writing, properly signed

AFFIDAVIT OF PERSONAL SERVICE

State of New York, County of Nassau, ss:

The undersigned, being duly sworn, deposed and says: deponent is not a party to the action, is over 18 years of age and resides at 453 W. Penn ST Long Beach NY

On the 4 day of March, 1977, dependent served the within Record - Brief - ~~Brief and Appendix~~ upon

attorney for Respondent - Appellant, at his office at

by delivering copies of the same to him (or a person of suitable age and discretion thereat). Deponent knew the attorney so served to be the attorney mentioned herein, as attorney for the party so served.

Guy Hamlett

Sworn to before me this
14 day of March, 1977

STUART DAVIS
NOTARY PUBLIC, State of New York
No. 30 0802240
Qualified in Nassau County
Commission Expires March 30, 1978